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80-2087

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM ROGER BOONE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

I. Whether petitioner was effectively denied a fair and impartial trial due to the trial court's refusal to grant relief under Rule 14 of the Federal Rules of Criminal Procedure.

PARTIES TO THE PROCEEDING

Pursuant to Rule 21(1)(b), the only party to the proceeding not listed in the caption of this Petition for Writ of Certiorari is Richard Dunham Hammond, Jr.

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OPINIONS BELOW

Following a timely appeal, the opinion of the United States Court of Appeals for the Eighth Circuit, No. 80-1405 Criminal, was submitted on December 12, 1980, and filed on March 4, 1981. A timely motion for rehearing was filed on March 18, 1981, and denied by the Court on April 6, 1981. The opinion of the United States Court of Appeals for the Eighth Circuit has not yet been officially reported. A copy of the opinion and denial of rehearing are attached in the appendix pursuant to Supreme Court Rule 21(k) (i).

JURISDICTION

The Jurisdiction of this Court rests on its power to grant certiorari from a court of appeals pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The text of the following constituional provisions and regulations relevant to the determination of the present case are set forth in the Appendix: U.S. Const. amend. V; U.S. Const. amend. VI; Fed. R. Crim. P. 8; Fed. R. Crim. P. 14.

STATEMENT OF CASE

A. Background

During the summer months of 1979, an informant, William Miller, advised the Drug Enforcement Administration that Richard Dunham Hammond, Jr., was interested in distributing drugs for profit. Pursuant to a prearranged plan, DEA special agents arranged to have Hammond witness a drug transaction (including fake cocaine) between informant Miller and themselves. The plan, effectuated on September 4, 1979, was designed to test the accuracy of the Informant Miller's information and convince Hammond that the DEA agents were, in fact, drug traffickers.

During the month of October, 1979, Special Agent Michael Leonard, who had been present during the September meeting described above, met several times with Hammond (R.52, 54-55, 69-77, 105-129). At these meetings discussions took place regarding drugs and where they could be purchased. Florida, Canada and South America were mentioned, with Hammond stating he had travelled to Florida and purchased cocaine (R.54-55, 112).

Agent Leonard and Hammond met two more times in November 1979 and once on December 3, 1979 (R.141-163, 180-181, 225-226, 230). They continued and made plans to travel together to Miami, Florida for the purposes of purchasing cocaine. On December 4, 1979, Agent Leonard, Hammond and Agent Curtis Workman flew to Fort Myers, Florida in a private airplane (R.235-237). The three subsequently flew to Miami, Florida (R.250). In Miami, the three purchased a substance from Petitioner alleged to be cocaine (R.253,378).

The following day, Agents Leonard and Workman, and Hammond, returned to Minneapolis, Minnesota (R.261). Shortly thereafter, Hammond was arrested. Hammond maintained that his drug activities were lawful in that he was acting within the scope of his employment as a reserve deputy for the Ramsey County Sheriff's Office; he further stated DEA agents had destroyed his investigation.

On December 13, 1979, he began to cooperate directly with the DEA agents (R.461). Hammond called Petitioner and informed him that he had been satisfied with his previous purchase and wished to make future purchases from him. During the following two weeks, numerous conversations were held by the two regarding an agreeable time and place to meet (R.477, 478, 492, 497). As a result of Hammond's requests, Petitioner flew to Minnesota on January 10, 1980. Shortly after meeting with Hammond and the DEA agents, Petitioner was arrested.

B. The Trial

Petitioner was indicted on February 8, 1980 for violations of 21 U.S.C. 841(a)(1),846 by a federal Grand Jury in St. Paul, Minnesota. Petitioner and Richard Dunham Hammond, Jr. were charged in Count I of the four count complaint with conspiracy to distribute cocaine. Counts II and IV charged Petitioner with distribution of cocaine on December 5, 1979 and with possession intent to distribute cocaine on January 10, 1980 in Minnesota respectively. Count III charged Co-Defendant

Hammond for possession of cocaine reflected in Counts I and II with intent to distribute in Minnesota on December 6, 1979.

The case was assigned to the Honorable Edward J. Devitt, Chief Judge, United States District Court, District of Minnesota, who arraigned Co-Defendant Hammond and Petitioner on February 14 and 15, 1980, respectively. After hearings on motions, and a two week continuance, the trial commenced on March 19, 1980.

Only moments after the District Court commenced the trial, Petitioner's counsel made an oral motion for severance based on his surprise that Co-Defendant Hammond had pled not guilty and intended to defend against the charges listed in his indictment (R.2, 5-6). His motion was denied. Petitioner's counsel again repeated his request for severance at the end of Hammond's attorney's opening statement, because, in his mind, the substance of the remarks uttered by Hammond's lawyer made it clear that the continuation of the joint trial would prejudice Petitioner (R.37). The request was denied. Petitioner made twenty-six motions for severance or mistrial throughout the trial because of his perceived prejudice to Petitioner caused by the joint trial (R.2, 37, 74, 79, 81, 98, 165, 211-212, 221, 240, 242, 297, 320, 436, 445, 468, 551, 575-576, 577, 596, 612, 726, 758, 860-861, 871-872).

On May 28, 1980, Petitioner received concurrent five year sentences of imprisonment on Counts I, II and IV with a three year special parole term to follow. Hammond received concurrent eighteen month sentences of imprisonment on Counts I and III with the same special three year parole term to follow. Thereafter, timely notice of appeal was filed.

C. The Appeal

The United States Court of Appeals for the Eighth Circuit rejected all of Petitioner's arguments on appeal. The Court denied Petitioner's Motion for Rehearing. Thereafter, a timely notice of appeal was filed.

ARGUMENT

I.

PETITIONER WAS EFFECTIVELY DENIED A FAIR AND IMPARTIAL TRIAL DUE TO THE TRIAL COURT'S REFUSAL TO GRANT RELIEF UNDER RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Petitioner initially submits that confusion and inconsistency exist among the federal courts of appeal regarding the analysis given factors alleged to be prejudicial due to a misjoinder of defendants. Petitioner further contends that the uncertainty underlying the rules of severance was a contributing factor in his being denied relief under Rule 14. Lastly, Petitioner respectfully submits that a careful review of the trial record reveals the presence of a multiplicity of factors whose cumulative impact was excessively prejudicial, thereby denying him his right to a fair trial.

A. Confusion And Inconsistency Underly The Basic Principles Applicable To Rule 14 Of The Federal Rules Of Criminal Procedure.

Rule 14 of the Federal Rules of Criminal Procedure establishes the courses of action available to a trial court should it determine that excessive prejudice exists in the case before it due to misjoinder. Rule 14 provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of courts, grant a severance of defendants or provide whatever other relief justice requires.

Fed. R. Crim. P. 14.[1]

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[1] Joinder of offenses or defendants is authorized under Rule 8 of the Federal Rules of Criminal Procedure. Fed. R. Cr. P. 8.

The rule has been construed with strict narrowness by the federal courts, even though many legal scholars[2] view joint trials as being an intrinsic source of prejudice, and severance, or preferably the lack thereof, has been the primary purpose behind innumerable protracted appeals. The astronomical remoteness with which severance is granted would seemingly lend creedence to the proposition that this area of law is well settled, widely understood, and consistently applied. Petitioner respectfully submits, however, that jurisdictional inconsistencies exist among the various circuits relative to the analysis appropriate for a proper determination of the presence of prejudice, and that confusion exists at the district court level as to what constitutes sufficient prejudice such that severance is warranted.

1. **While The Circuit Courts Of Appeal May Be Found To Be Generally Consistent In The Abstract, They Become Inconsistent In Ruling On Specific Prejudices.**

The federal courts of appeal seem to enjoy uniformity in the vague, ambiguous manner with which they describe the prejudice necessary for the allowance of severance. The First Circuit Court of Appeals has indicated that a defendant seeking severance must show the requisite "strong showing of prejudice". *United States* v. *Richman,* 600 F.2d 286,299 (1st Cir. 1979). The Second Circuit dictated that one must "show that the defendants did not receive a fair trial, that a miscarriage of

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[2] *See generally, E.G.,* Dawson, *Joint Trials of Defendants in Criminal Cases: Analysis of Efficiencies and Prejudices,* 77 Mich. L. R[illegible]. 1379 (1979); *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure,* 74 Yale L. J. 553 (1965). Orfield, *Relief From Prejudicial Joinder in Federal Criminal Cases (Part I),* 36 Notre Dame Lawyer 276 (1961). Walsh, *Fair Trials and the Federal Rules of Criminal Procedure,* 49 A.B.A.J. 853 (1963); *Joinder of Defendants in Criminal Prosecutions,* 42 N.Y.U. L. Rev. 513 (1967).

justice has occurred." *United States* v. *Herrerra,* 584 F.2d 1137 (2nd Cir. 1978). The Third Circuit became somewhat specific and said sufficient prejudice exists if the jury is unable to 'compartmentalize' the evidence. *United States* v. *Boyd,* 595 F.2d 120,125 (3rd Cir. 1978). The Fifth Circuit instructed that a defendant desiring a severance must demonstrate 'specific and compelling prejudice'. *United States* v. *Wolford,* 614 F.2d 516 (5th Cir. 1980). The Sixth Circuit insists that there be "the likelihood of substantial prejudice to the defendant(s) if tried together." *United States* v. *Sims,* 430 F.2d 1089 (6th Cir. 1970). The Seventh Circuit offered the helpful advice that severance should only be granted for the most cogent of reasons, one being the existence of prejudice. *United States* v. *Crouch,* 528 F.2d 625 (7th Cir. 1976). The Eighth Circuit has suggested that a joint trial must prejudice one's right to a fair trial. *United States* v. *Jackson,* 549 F.2d 517,523-524 (8th Cir. 1977), *cert. denied,* 430 U.S. 985 (1977). And, the Ninth Circuit has said that a joint trial must be 'manifestly prejudicial' before severance is proper. *United States* v. *Bronco,* 597 F.2d 1300,1302 (9th Cir. 1979). It is axiomatic in the federal court system that the granting of severance lies within the sound discretion of the trial judge. Moreover, the federal courts would agree with the Tenth Circuit's sentiments that ". . ., when joinder of either defendants or offenses causes the actual or threatened deprivation of a fair trial, severance is no longer discretionary." *United States* v. *Butler,* 494 F.2d 1246,1256 (10th Cir. 1974).

Petitioner contends that the instant case is prejudicial to him because of a misjoinder of defendants. Cases where appeals were brought due to misjoinder of defendants often make mention of the same factors; two of these are antagonistic defenses and the existence of a confession or admission by one of the co-defendants.[3] While there is consistency in the end result of their opinions, federal appellate courts seem to arrive there with different reasonings.

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[3] These are but two of several factors often raised by criminal defendants on appeal. They are mentioned because they are present in this case as well.

In discussing antagonistic defenses, the First Circuit Court of Appeals specified that defenses among co-defendants must be irreconcilable such that the jury would infer from the conflict that both are guilty. *United States* v. *Davis,* 623 F.2d 188 (1st Cir. 1980). *Accord, United States* v. *Ehrlichman,* 546 F.2d 910 (D.C. Cir. 1976). Another appellate court said antagonistic defenses exist if one co-defendant's defense is believed at the expense of the other's. *United States* v. *Ziperstein,* 601 F.2d 281 (7th Cir. 1979). Still another circuit enunciated its position in stating that, "An antagonistic defense may require severance, particularly if that defense admits to same or all of the elements to the charge." (Citations omitted) *United States* v. *Roberts,* 583 F.2d 1173 (10th Cir. 1978). The Fifth Circuit urges a far more stringent line of thought that defenses must be irreconcilable, not merely antagonistic.[4] *United States* v. *Mota,* 598 F.2d 995 (5th Cir. 1979). Petitioner submits this is but a single area certain courts view where inconsistency may be found. The fact that severance is uniformly difficult to achieve is not indicative that federal appeals courts apply the same tests in determining the existence of prejudice.

2. The Generalities Put Forth By The Circuit Courts Of Appeal Have Fostered Confusion Among The Federal District Courts When Regarding Severance Issues.

The one common thread present in every Circuit's attempt to define the prejudice needed to justify a severance is the inclusion of the word 'prejudice'. When one attempts to define a word and includes that very word in one's definition the result is circular and simply non-responsive. Such semantical sleight of

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[4] The convervatism of the Court's philosophy is also evident in *United States* v. *Mota,* 598 F.2d 995 (5th Cir. 1979) by their finding that severance was not warranted in the case even though the trial court had been compelled to issue twenty-seven limiting instructions.

hand begs the question of what constitutes sufficient prejudice, and how much weight should be given to those factors viewed as prejudicial. Petitioner realizes that prejudice can manifest itself in literally countless ways. Recognizing this, courts have long held that a determination of whether sufficient prejudice exists must rest largely on the facts of each individual case. Nevertheless, an intellectual void persists, and trial judges still lack a sense of direction.[5] Petitioner respectfully submits that the many thousands of cases filed in our appellate courts reflect a deep dissatisfaction on the part of our citizenry and legal profession with Rule 14.

The confusion and uncertainty wrought by the absence of even the loosest of guidelines at the district court level has created confusion in the federal appellate courts as well. Because a trial court judge is provided with no boundaries or delineations as to the scope of his discretion, appellate have the unenviable and impossible task of determining whether a trial judge has abused his discretion in denying relief under Rule 14. In an attempt to give their own house a sense of order when dealing with severance issues, the federal appellate courts devised four different doctrines. These doctrines are the basis for upholding a trial judge's action of denying a severance.

The first doctrine relied upon by the appellate courts is the heavy reliance on limiting instructions. *E.g., Blumenthal* v. *United States,* 332 U.S. 539 (1947). The critics of this doctrine

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[5] Petitioner submits the trial judge in the case at bar was also confused. He also did not know the law because he seemed to deny the request for severance because of lateness (R.40-42, 576-578). A judge has a 'continuing duty' to prevent prejudice at all stages of the proceeding. *United States* v. *Crawford,* 581 F.2d 489 (5th Cir. 1979).

are legion.[6] Nevertheless, the doctrine is used, and appellate courts have found that limiting instructions can eradicate the worst forms of prejudice.

A second doctrine put forth to support a denial of relief under Rule 14 is "cure by verdict" - a roughshod device designed to measure whether the jury followed the judge's instructions and charges. Under this doctrine, appellate courts look to the verdict: acquittal of a defendant on any court cures any error. *E.g., Fernandez* v. *United States,* 329 F.2d 899 (9th Cir. 1964). The theory behind the doctrine assumes that if the jury was selective in its verdict, it must have also been discriminating regarding the evidence - accepting admissible evidence and rejecting the inadmissible. *Peckham* v. *United States,* 210 F.2d 693, (D.C. Cir. 1953).

An offshoot of the "cure by verdict" doctrine is the "cure by concurrent sentence" doctrine, which discounts prejudice if a single sentence is imposed for joint offenses. *E.g., Patterson* v. *United States,* 324 F.2d 310 (5th Cir. 1963). This heavy-handed device ignores the possibility a defendant may have been acquitted absent joinder or received separate short or suspended sentences on each count.

The final doctrine used to disprove prejudice from joinder is based on the presence of overwhelming evidence of guilt in the record. Prefudice, no matter the extent, is found harmless if, upon examination of the whole record, the court finds that the jury could have a basis for its verdict notwithstanding the objec-

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[6] *E.g., Barton* v. *United States,* 263 F.2d 894, 898 (5th Cir. 1959); *Delli Paoli* v. *United States,* 352 U.S. 232, 247 (1957); *The Limiting Instruction - Its Effectiveness and Effect,* 51 Minn. L. Rev. 264 (1966).

tionably prejudicial matter. *Delli Paoli* v. *United States, supra.* This action has rightfully been criticized as invading the mind and province of the jury, and being an act appellate courts are not properly suited for.

One legal scholar succinctly stated the inadequacies of these doctrines:

> And even assuming that these doctrines are reliable, they are not responsive to Rule 14. The function of the rule is to avoid prejudice before the fact by segmenting trials; the question presented by the rule is that of the proper guides and standards for exercise of trial court discretion when the defendant has moved for relief from prejudicial joinder. Rather than being addressed to this issue, the four doctrines are capable of use only as after the fact determinations of whether the failure to grant the proper relief has been cured. Since these devices fail to identify the cause of prejudice and since they do not specify the situations in which single trials should be granted in order to prevent prejudice, they provide the trial courts with no meaningful standards to guide their exercise of discretion under Rule 14. For the same reasons, these doctrines of cure do not permit appellate courts to ask the responsive question and determine whether the trial court has abused its discretion under Rule 14.

Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L. J. 553 (1965).

Petitioner subscribes to the accuracy of the author's remarks. More importantly, however, these various doctrines establish the irrefutable fact that differences and inconsistencies do exist among the circuit courts of appeal when they address prejudicial joinder under Rule 14.

3. A Direct Consequence Of The Confusion And Aimlessness Suffered By Trial Courts Is Their Excessive Reliance On Judicial Economy As A Basis For Denying Relief Under Rule 14.

Many trial judges mechanically and summarily deny motions for severance, citing the advantages of a joint trial on the economical administration of justice. Experience has taught the district courts in this country that they will not be reversed on failing to grant relief under Rule 14. It is clear, on a careful study of the case law dedicated to Rule 14 issues, that judicial economy is a concern that enjoys an almost unprecedented weight in American jurisprudence rivalled only by fundamental freedoms in a compelling state interest analysis test. Judicial economy is the death knell of a motion for severance.

Petitioner recognizes that judicial economy and the efficient administration of justice are valid concerns, and laudable objectives. It is not Petitioner's intention to down play or diminish these important considerations. However, irrespective of how desirable these goals may be, they cannot be achieved at the expense of a fair trial. *United States* v. *Echeles,* 352 F.2d 892 (7th Cir. 1965). It does not stand to reason that the United States Attorney's Office is so pressed for time, nor that the United States Treasury is so short of cash, that the Sixth Amendment guarantee to a fair and impartial trial should be cast by the wayside in severance cases. Clearly, there should be a correspondingly heavier burden of proof on one desiring severance when separate trials would be inordinately expensive. It probably should be more difficult to require a severance in a case involving twenty defendants, than in a case involving only two. Petitioner agrees with the Court in *Schaffer* v. *United States,* 221 F.2d 17 (5th Cir. 1955) where it stated that "there being only

two defendants, it would not be very time consuming but entirely practicable to accord them separate trials." *Id.* at 19.[7]

Concern for judicial economy has not been without its critics on the Court. Justices Brennan, Douglas and Marshall in their dissenting opinion in *Nelson* v. *O'Neil,* 402 U.S. 622 (1971), maintained that generous severance rules would reduce the number of appeals, in effect promoting judicial economy. Mr. Justice Marshall made the telling point that "much of the supposed saving (of the joint trial) is lost through protracted litigation that results from the impingement or near impingement of a co-defendant's right(s)." *Id.* at 635.

4. **Guidelines Should Be Established Which Alleviate Or Minimize The Problems Related To Rule 14 Concerns.**

Petitioner believes that this Honorable Court can alleviate the conditions previously discussed through the promulgation of loose and flexible guidelines which would have the inherent capability of being applied to many and diverse factual settings. Petitioner is fully cognizant that prejudice can manifest itself in a trial in a virtually limitless number of ways, thus precluding the application of specific rules that would retain any usefulness. Clearly, the existence of prejudice in a criminal trial will always be predicated on factual analysis; and, every case is factually unique. Nevertheless, there exists a desperate need for some kind of framework within which severance issues may be decided fairly and thoughtfully.

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[7]Petitioner submits there would have been little added expense in severing the joint trial. It will subsequently be established that the evidence against Petitioner comprised only a small fraction of the transcript. A subsequent trial against Petitioner would very likely have only lasted a day or two.

Petitioner respectfully suggests that the foundation for the necessary guidelines be a cumulative test. No one factor should be compelling enough to warrant severance of a joint trial, unless, of course, the trial judge, in exercising his discretion, finds such individual factors sufficiently prejudicial. However, where there are alleged to be several factors prejudicial to a co-defendant because of a joinder of trials, each factor should not only be analyzed in an isolated context, but also scrutinized in conjunction with the other alleged factors, in order to make a judgment as to the totality of the prejudice and its cumulative effect on the fairness of the trial. In effect, what Petitioner proposes is an examination of prejudice on a sliding scale test. The greater the number of legitimate factors in a trial which are prejudicial, or the greater the number of times a single prejudicial factor presents itself, the less discretion a trial court should have. This is the only possible response, to the legal morass which Rule 14 considerations have become, which maintains its roots firmly bedded in reality. This proposition may be of little value to the criminal defendant claiming his joint trial was overly prejudiced by a certain single issue. No realistic guidelines can be established which would be of any use to him - he would simply have to rely on the trial court's discretion. But this proposed test can help Petitioner, and those similarly situated, when confronted by numerous prejudicial factors whose cumulative impact is irreparably harmful, and violates his right to a fair trial as guaranteed by the Sixth Amendment.

The following suggested factors would only be applicable to a misjoinder of defendants, not offenses, and are by no means to be viewed as exclusive. They are offered solely as examples of factors a court may wish to consider in a cumulative test. In fact, the factors, as previously discussed, are potentially infinite. Petitioner respectfully suggests the following factors as examples: (1) misconduct by a co-defendant's attorney or prosecutor; (2) a co-defendant's admissions or confessions, whether written and extrajudicial, or oral and on the stand; (3)

the existence of antagonistic defenses; (4) grossly disproportionate evidence as between co-defendants; (5) express or implied statements by a co-defendant's attorney on a defendant's election not to testify; (6) instances of inadequate cautionary instructions; (7) jury confusion regarding evidence applicable to each defendant; (8) excessive number of defendants in a trial; (9) outrageous conduct by a co-defendant while in the courtroom and the jury's presence; and (10) a joint trial wherein one co-defendant has received great notoriety or infamy as a result of pretrial publicity.[8]

Petitioner respectfully submits that should this Court choose to reject his proposed guidelines, then at least an easing of the burden seems to be called for. Rule 14 should be interpreted to mean that a court should grant relief on less than a showing of certain, unequivocal prejudice. And, at a minimum, Rule 14 should certainly not be interpreted to mean that the degree of prejudice is to be balanced against the procedural advantages of a joint trial. *See, e.g., United States* v. *Harris,* 458 F.2d 670, 673 (5th Cir. 1972).

B. An Analysis Of The Trial Transcript Establishes The Existence Of Factors Whose Cumulative Effect Denied Petitioner A Fair And Impartial Trial.

A review of the trial record reveals a host of factors which Petitioner submits prejudiced him to the extent that he was denied a fair trial. Petitioner strongly contends the following factors prejudiced him singularly and collectively: (1) misconduct by Mr. Scott, Defendant Hammond's attorney; (2) on-the-stand confessions or admissions by Defendant Hammond whereby he admitted to all elements of the crimes against him,

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[8]Surely a defendant, who was connected in some minute or distant way with a co-defendant, such as the Yorkshire Ripper or the murderer of Atlanta's children, would be entitled to severance.

save one, and repeatedly inculpated petitioner in his wrongdoings; (3) the dual status held by Defendant Hammond whereby during one portion of the trial he was ostensibly a co-defendant, and during the latter portion he assumed the role of a key witness against Petitioner; (4) the existence of antagonistic defenses; (5) that the vast majority of evidence centered around Defendant Hammond, and had no relevance to Petitioner; (6) repeated statements by co-defendant's counsel during closing argument that defendant Hammond had testified, raising the inference that Petitioner had not; (7) that the limiting instructions, as issued by the trial court, were inadequate to defend against prejudice. Petitioner's trial counsel was prompted, because of these prejudicial factors, to ask for severance or mistrial a minimum of twenty-six times throughout the course of the trial.

1. Co-Counsel's Actions In The Case At Bar Were Highly Prejudicial To Petitioner.

Petitioner firmly believes that this factor is the most prejudicial and outrageous to be found in the record. Moreover, Petitioner submits that this issue alone, in and of itself, should have warranted the granting of Petitioner's motion for severance.

Initially, Mr. Scott, Defendant Hammond's counsel, surprised Petitioner's counsel in putting forth the offered defense (R.5,1, 7-10; R.6,1, 20-24). Petitioner's counsel had been given the impression, on Saturday, March 14, 1980, four days prior to trial, that Co-Defendant Hammond would plead guilty. Mr. Scott's defense, if it can fairly be called that, was to have his client admit to every element of every count charged against him except one, that one being that Defendant Hammond lacked the requisite intent or *mens rea* to commit the crimes charged because he believed himself to be acting within his official duty as a reserve police officer (R.28,1, 14-28; R.36,1, 15-16). Mr. Scott also noted his client's unusual dual status and admitted

figuratively that for a portion of the trial Defendant Hammond would be sitting at the defense table, and that for the remaining portion of the trial he would be sitting at the prosecutor's table (R.28,1, 7-13). This development closely aligns the facts of this case with those of *United States* v. *Johnson*, 478 F.2d 1129 (5th Cir. 1973), a case where severance was granted. The *Johnson* case involved two defendants who were charged with conspiracy and possession of counterfeit money. Defendant Smith's defense was that he was an informer and was not criminally liable because he lacked the *mens rea* to violate the statute. Smith's attorney described him as a "white hat" whose primary goal was to assist law enforcement officers, and whose secondary goal was the apprehension of Johnson. Still another similarity between the present case and *Johnson* may be found in the language that, "A study of the record reveals that Smith's attorney implicated Johnson at every opportunity." *Id.* at 1133. Mr. Scott's defense tactics were so devastating to his own client that he felt it necessary to remind the court that he was not incompetent (R.83,1, 10-17).

Perhaps the most prejudicial aspect of Mr. Scott's conduct was the insidious manner in which he conducted his cross-examination of the government's star witness - Agent Michael Leonard. Petitioner would especially direct this Honorable Court's attention to the cross-examination found between pages 262 and 334 of the trial transcript. The traditional purposes for cross-examination are to test the veracity of a witness under the stress of vigorous questioning; to ferret out inconsistencies and gaps in a witness' account; the impeachment or discrediting of a witness. Mr. Scott does not subscribe to these beliefs. Mr. Scott could not have been more agreeable or friendly with Agent Leonard. However, Mr. Scott went much, much further and elicited extremely damaging testimony with the use of leading, suggestive and conclusionary questions. He conducted his cross-examination as though it were a second direct examination. He did a better job of prosecuting his own client and Petitioner

than the U.S. prosecutor ever could have. Throughout this and further cross-examination Mr. Scott bolstered witnesses' testimony and generally strengthening their credibility (R.302, 308).

During the early cross-examination of Agent Leonard by Mr. Scott, the Court recessed for four days (R.281-282). The court reconvened at 2:15 p.m. on March 24, 1980, and only moments after Mr. Scott had resumed cross-examination, the Court asked him, "Would you help us all, where is this now so we can all be refreshed, summarize it?" (R.285,1, 12-13). The Court was legitimately concerned that the four day recess had affected the jury's memory of the case. Still, it is unlikely the Court wanted Mr. Scott to review everything discussed on direct examination.

Mr. Scott, however, seemed more than eager to please, and as a consequence, the subsequent cross-examination is unbelievable. Mr. Scott reviewed everything covered by the prosecutor, enlarging upon it, and heightening the witnesses' testimony (E.g., R.325, 327, 328, 330). He assissinated his own client with inferences to South American and Canadian drug connections and a plot to exchange stolen trucks for drugs (R.291,1, 9-25; 292, 311-312). Mr. Scott branded a great deal of damaging evidence into the jury's mind when he suggested the tape recordings offered by the government, took his, Agent Leonard's, credibility out of question, implicitly suggesting tape recordings are unimpeachable (R. 302,1, 5-17). Mr. Scott also corrected Agent Leonard when he uttered a mistake or when his memory was not quite clear (R. 308,1, 4-9, 330,1, 5-13, 353,1, 15-22).

The net result of Mr. Scott's actions in pursuing his defense is that the Petitioner was confronted by two prosecutors - the United States Government and Co-Defendant Hammond. Not only was the Petitioner required to defend himself from the declared adversary, the prosecution, but he was also forced to defend his flank from one sitting next to him at the defense table.

2. The In-Court Confessions Or Admissions Of Defendant Hammond Coupled With His Unusual Dual Status Of Co-Defendant And State's Witness Were Highly Prejudicial To Petitioner.

Petitioner is not claiming that a *Bruton* type situation exists in the case before the bench. *See, Bruton* v. *United States,* 391 U.S. 123 (1968). Defendant Hammond's confessions or admissions were not extrajudicial written statements, but orally given while on the stand. Petitioner was allowed to confront his co-defendant accuser as guaranteed by the confrontation clause of the Sixth Amendment. Petitioner's attorney did, in fact, cross-examine Co-Defendant Hammond.[9] Petitioner, nevertheless, respectfully maintains that Co-Defendant Hammond's ambiguous status poisoned Petitioner's right to a fair trial.

It is one thing for a defendant to point an accusing finger at his co-defendant in an effort to blame that co-defendant, and, in the process, vindicate himself. The average juror, relatively well educated on human nature, can deal with that. But is quite another thing for that same defendant to point the same accusing finger at a co-defendant, and, ironically, still freely admit his wrongdoing. In this situation, the accusing defendant's credibility is greatly solidified in the jury's eyes for the simple reason that his action is not consistent with what would normally be expected in that situation. His testimony becomes more trustworthy because of his seemingly noble act of voluntarily inculpating himself. This is probably the reasoning behind one court's suggestion that severance may be required where one defendant's defense "admits to some or all of the elements to the charge." (Citations omitted) *United States* v. *Roberts,* 583 F.2d 1173 (10th Cir. 1978). Defendant Hammond freely admitted to every accusation of wrongdoing levelled at him by the

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[9] Petitioner feels that it is important to remind the Court that he was surprised by Co-Defendant Hammond's decision to testify. Under these circumstances, Petitioner's counsel was not afforded sufficient time to adequately prepare for corss-examination.

prosecutor. He agreed to every action the prosecutor accused him of taking. The fabric of Defendant Hammond's defense was the single thread that he did not possess the necessary criminal intent.

Of even greater importance is the fact that the prejudicial situation described above was magnified by Defendant Hammond's vague status - a status which Petitioner strongly contends confused the jury. As indicated in Petitioner's statement of facts, Hammond was treated as a defendant for the events leading up to his arrest on December 5, 1979, and as a state's witness subsequent to that, including the chain of events leading up to Petitioner's arrest. This dual status enjoyed by Defendant Hammond was highly prejudicial and also was a heavily contributing factor in Petitioner being denied a fair trial. Thus dual status also offered the United States prosecutor a unique procedural advantage in that while engaged in cross-examination of Defendnt Hammond, he could and did elicit damaging testimony concerning matters which arose after Hammond's arrest which were in turn to be offered against Petitioner (R.861,1, 3-5).[10] Thus, the prosecutor's job of introducing evidence against Petitioner was facilitated by his ability to use leading questions. It is certainly easier to cross-examine one defendant as to another defendant's actions than it is to elicit the same testimony from a state witness during direct examination.[11]

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[10] Why did not the prosecutor offer the testimony against both Hammond and Boone? *See,* R.861,1, 3-5.

[11] It is extremely interesting to note that Petitioner's counsel objected to Mr. Scott's cross-examination of a witness on the basis that Hammond was assisting the government at the time in question R.512,1, 21, 514,1, 20. The court, seeing the full ramification of Hammond's dual status, sustained the objection. Petitioner believes the prosecutor should have been similarly restrained from cross-examining Hammond for the purposes of introducing evidence against Petitioner.

If ever a situation existed where the severance of a trial was warranted surely it is the case at bar. The state should either grant immunity to one defendant or try one first and then the other; the defendant tried first, having nothing to lose, at a later trial would be more inclined to testify. But, in no case, should the government be allowed the novel approach of rolling two identities - defendant and state's witness - into one individual and pitting him against a hapless co-defendant. The prejudice created by this hybridization is literally explosive.

3. Antagonistic Defenses Existed Between The Defendants In The Case At Bar Which Prejudiced Petitioner.

The Eighth Circuit Court of Appeals declined to make a finding that severance should have been granted in the present case in large measure because of its heavy reliance on its finding that Hammond's and Petitioner's defenses were, in fact, consistent (P.6). Petitioner concedes that, superficially, it is a valid observation - what could be more consistent than one defendant raising the defense of being a law enforcement officer while engaged in the acts charged, and the other defendant raising the defense of entrapment? Petitioner's criticism regarding antagonistic defenses is based upon a close scrutiny of how the defenses were effectuated.

It must be remembered that Petitioner's trial counsel was surprised to discover Hammond had technically pled not guilty and would submit a defense (R.5-6). Petitioner's attorney was prepared to raise the defense of entrapment without Hammond's presence; Petitioner believes the defense could have more easily established without any loss of persuasiveness. Petitioner also agrees with the Eighth Circuit Court's observation that Hammond could have testified against Petitioner, even if the trials had been served (P.6). However, Hammond would have done so only in the clearly defined role of a state's witness, as discussed in Petitioner's previous argument. Even in that

context, the Petitioner's defense would have been more credible than it actually was as presented during the trial. Moreover, Petitioner would respectfully point out the reverse observation to that of the Eighth Circuit - it is entirely possible that Hammond would have chosen not to testify in a subsequent trial against Petitioner. This would especially be the case if Hammond felt no compunction to curry favor with the trial court judge or jury, particularly with respect to sentencing.[12] Had this been the case, and Hammond had not testified, Petitioner's defense would have been at its strongest. petitioner strongly disagrees with the lower court's finding that without Hammond's testimony Petitioner's defense would have had little support, because independent proof could have been utilized.[13] Furthermore, the Court's statement assumes that if Hammond had been believed, Petitioner's defense would have been more palatable.

The Eighth Circuit Court of Appeals failed to observe that Hammond's defense progressed along two distinct lines, The Court noted the first, Hammond's desire to paint himself as a concerned law enforcement officer. If this had been the extent of Hammond's actions his defense would not have been antagonistic to Petitioner's. The other course of action taken by Hammond, and which is the basis for Petitioner's position that antagonistic defenses did exist, was Hammond's wholesale attack on Petitioner while on the stand, and through his lawyer throughout the trial. Petitioner refuses to accept the argument that Hammond needed to defend himself by attacking him. He could have furthered his defense by simply placing all his ac-

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[12] Petitioner would remind the Court Defendant Hammond received a sentence of eighteen months to his five years.

[13] A good trial lawyer would have made extremely persuasive use of Hammond's law enforcement connections and his assistance to the government following his arrest.

tions in a favorable light and accentuating his ties to law enforcement.[14] In other words, Hammond should have conducted his defense as though Petitioner had not been in the picture at all. Had Hammond done this the defenses would not have been antagonistic.

4. The Vast Majority Of Evidence Introduced At Trial Was Applicable Only Against Defendant Hammond.

The trial transcript in the case at bar deals almost exclusively with Defendant Hammond. The record of the trial consisted of nine hundred sixty pages. The majority of witnesses' testimony concerned only Hammond. Petitioner is discussed directly on twenty-seven pages with another forty-four pages of transcript consisting of a tape recording allegedly containing Petitioner's voice. The government's star witness, Agent Michael Leonard, took up three hundred ninety-two pages with his testimony and discussed Petitioner on eleven of those pages (R.47-241, 250-362, 471-515, 604-628, 649-667).

Petitioner is cognizant of the fact that disproportionate evidence as applicable to defendants has never been the basis for severance. Perhaps alone it should not be, except where repeated inferences of 'guilty by association' or 'spill over' effects are present. *United States* v. *Mardian,* 546 F.2d 973,977 (D.C. Cir. 1976). Petitioner believes that a spill over effect very likely occurred, due to continuous testimony as to Defendant Hammond's numerous other activities. More importantly, however, Petitioner believes this issue should not be reviewed in a vacuum, but along with all those factors previously discussed and those yet to be analyzed.

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[14] This defense could have been effectively carried out because if Hammond had been cross-examined about Boone, his lawyer could simply have objected that the question was outside the scope of direct examination, which it would have been.

5. Repeated References To Defendant Hammond's Willingness To Take The Stand By His Attorney Raised The Inference That Petitioner Did Not, Thereby Prejudice Him.

In discussing the comments made in co-defendant's attorney's closing statement, Petitioner wishes to emphasize that he is not openly accusing Mr. Scott, Defendant Hammond's attorney, of intentional wrongdoing. Case law apparently indicates intent is immaterial. *See, United States* v. *Aguiar,* 610 F.2d 1296 (5th Cir. 1980); *Deluna* v. *United States,* 308 F.2d 140 (5th Cir. 1962). Comments to the effect that a criminal defendant chose not to testify violates that individual's right to remain silent, as guaranteed by the Fifth Amendment. Such comments can vitiate a conviction. *United States* v. *Edwards,* 576 F.2d 1152,1154 (5th Cir. 1978). Petitioner would also respectfully suggest comments on one's failure to testify would be appropriate grounds for the granting of severance. It is irrelevant that one other than the prosecutor made the remarks, *e.g., United States* v. *Kaplan,* 576 F.2d 598,600 (5th Cir. 1978), *cert. denied,* 439 U.S. 1078 (1979), or that the comments were merely indirect. *United States* v. *Brown,* 546 F.2d 166,173 (5th Cir. 1977).

Mr. Scott made nine references in his closing argument to the effect that his client, Defendant Hammond, testified. He made no direct remarks on Petitioner's refusal to testify. Mr. Scott's remarks are the following: "The witness is up there to testify to the facts just as my client, . . ." (R.899,1, 16-17); ". . . as my client told you from the witness stand, . . ." (R.900,1, 16-17). "My client, of course, has said not guilty all the way through and he presented his evidence before you" (R. 900,1, 20-22); ". . ., what my client has told you, is that he is in fact innocent of these charges" (R.901,1, 2-3). "I'm going to tell you though that there is evidence on both sides aside from my client's testimony, absolutely aside from his testimony there is evidence on both sides of this issue" (R.902,1, 21-24); ". . . because if as

my client testified to, . . ." (R.903,1, 13-14). "That is the person (Hammond) that you saw testify up there" (R.916,1, 2-3); ". . . Think long and hard and you talk it out long and hard over whether or not you thought that man (Hammond) was telling the truth when you saw him and you heard him; . . ." (R.916,1, 20-23). And, the following excerpt is from Mr. Scott's very last sentence to the jury, ". . . you're going to come to the conclusion that my client was telling the truth when he testified" (R.918,1, 11-12).

It is not Petitioner's intention to take these remarks out of context nor to misstate what Mr. Scott meant when he uttered them. They are offered solely to demonstrate the frequency with which the remarks were made and what the substantive essence of the words appears to be. Again, it should make little difference whether Mr. Scott's remarks were intentional or innocent - the imapct is the same. Petitioner respectfully submits that, even though his refusal to testify was not directly mentioned, the inferences and innuendo brought forth by the quotes above nevertheless firmly planted in the jury's mind the fact that Hammond testified and that Petitioner did not. Therefore, Petitioner contends his constitutional right not to testify and to a fair trial were abridged. This factor alone should warrant reversal of Petitioner's conviction and a remand for a new trial. Should the Court disagree, it is nevertheless urged that this aspect of Petitioner's trial be considered in the cumulative sense along with the overwhelming prejudice provided by those elements previously discussed.

6. **Petitioner Contends That The Limiting Instructions, As Issued By The Trial Court, Did Not Cure The Prejudice Prevalent Through His Trial.**

The Honorable Edward J. Devitt presided over the present case at the trial stage. Judge Devitt is the co-author of the widely used and widely respected treatise on federal jury practice and instructions. Devitt and Blackmar, *Federal Jury Practice and Instructions, Civil and Criminal,* (West 3rd Ed. 1977). In sec-

tion 10.15 entitled "Cautionary Instructions", Judge Devitt gives examples of appropriate limiting instructions *Id.* West Supp. 1981 at 275,279. *See also,* §1017 at 283, *surpa.* This is an excellent instruction suggesting evidence be admissible against one defendant, and not another.

The District Court is as knowledgeable on jury instructions and the importance cautionary instructions have is limiting prejudice as any district court in the United States. Yet, the District Court never followed its own advice. Limiting instructions were requested numerous times, including several times by the prosecutor on Petitioner's behalf. Judge Devitt, in all but one instance, issued the cautionary instruction in one short sentence (R.53,1, 18-19; R.240,1, 22-23; R.266,1, 9-10).

In two instances the prosecuting attorney requested a limiting instruction for the Petitioner's benefit (R.313,1, 13-21; R.435,1, 5-9). The Court answered the latter request with the words, "I so advise you" (R.435,1, 10). On still two other occasions, the prosecutor would concur that a limiting instruction should be given when requested by Petitioner. On both those occasions the District Court issued a court instruction; the first being, "Yes. This has nothing to do with Mr. Boone" (R.828,1, 11-12). The second instruction issued by the Court was, "You are so instructed, members of the jury" (R.836,1, 11-12).

Petitioner suggests that it is prejudicial for the prosecutor to either request on his own initiative (or concur with defense counsel) a limiting instruction. This practice is not helpful, and very likely achieves a result exactly opposite that intended by the instruction. Moreover, Petitioner contends that he suffered further prejudice by the casual and brief manner with which the District Court issued its limiting instructions. This lent an air of unimportance to the instructions. Additionally, the jury was never told the reason why it should disregard the objection to evidence. For these reasons, Petitioner respectfully submits this was a prejudicial element in his trial which should also be regarded with those factors previously elaborated.

CONCLUSION

Petitioner submits that to sustain the lower courts' findings that severance of his joint trial was not warranted under Rule 14 would be violative of constitutional policy respecting the Sixth Amendment, and would frustrate the congressional intent to eradicate excessive prejudice in joint trials.

Wherefore, Petitioner respectfully urges this Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit, and remand this case for a new trial.

Respectfully submitted,

Hale W. Brown

Michael J. Doddo

Attorneys for Petitioner

APPENDIX

APPENDIX A

Relevant Constitutional Provisions

United States Constitution, amendment V, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Relevant Rules

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or trans-

action or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confession made by the defendants which the government intends to introduce in evidence at the trial. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1405

United States of America,
Appellee,

v.

William Roger Boone,
Appellant.

Appeal from the United
States District Court
for the District of
Minnesota.

Submitted: December 12, 1980
Filed: March 4, 1981

Before HEANEY, ROSS and McMILLIAN, Circuit Judges.

HEANEY, Circuit Judge.

Appellant William Roger Boone appeals from his conviction on two counts of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. He raises four issues on appeal: (1) whether the evidence was suffi-

cient to prove him guilty of the conspiracy charge; (2) whether the district court erred in concluding that Boone waived his venue objection; (3) whether the district court gave the jury incomplete limiting instructions on certain evidentiary questions and otherwise conducted the trial in an improper manner; and (4) whether the trial court abused its discretion in denying Boone's motion to sever his trial from his co-defendant's. We affirm.

The charges against Boone were based upon two sales of cocaine arranged by Richard Dunham Hammond, Boone's co-conspirator. The testimony reveals that the first sale, which occurred on December 5, 1979, in Miami, Florida, was made in the presence of two Drug Enforcement Administration agents who were working undercover. Hammond paid Boone $19,000 for 383 grams of cocaine. Hammond and the agents then returned to Minnesota, where Hammond was arrested. He was released without charge, however, and began working with the DEA to set up another cocaine deal with Boone. These efforts led to Boone's travelling to Minnesota to complete the transaction. Boone was arrested on January 10, 1980, shortly after he had sold approximately four pounds of cocaine to a DEA agent for the price of $97,000.

Boone's first contention is that the evidence is not sufficient to support a guilty verdict on Count I, the conspiracy charge. He argues that the proof only shows that he sold cocaine to Hammond, not that he conspired with Hammond intending to further distribute controlled substances.[1] We cannot agree.

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[1]The offense underlying the conspiracy related to the events leading up to and including the sale of drugs on December 5, 1979. Because Hammond was working as a government agent at the time of the January 10, 1980 sale, he could not be considered a conspirator with Boone at that time.

The essence of a conspiracy is an agreement between two or more persons to commit an illegal act. *See United States* v. *Cohen,* 583 F.2d 1030, 1039 (8th Cir. 1978); *United States* v. *Powell,* 564 F.2d 256, 258 (8th Cir. 1977), *cert. denied,* 435 U.S. 904 (1978). The existence of the agreement constituting a conspiracy, however, need not be proved by direct evidence; it may be inferred from the actions of the parties. *See e.g., Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *Langel* v. *United States,* 451 F.2d 957, 961 (8th Cir. 1971).

In this case, the evidence is sufficient to permit the jury to infer that a conspiracy to distribute drugs existed. First, the quantity of cocaine sold on December 5, 1979, was sufficiently large to suggest that further distribution of the drug was contemplated. The jury is permitted to consider the size of the transaction in its deterination of whether a scheme to distribute the drugs existed. *See Direct Sales Co.* v. *United States,* 319 U.S. 703 (1943); *United States* v. *Rojas,* 537 F.2d 216, 221 (5th Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977); *United States* v. *Blake,* 484 F.2d 50, 58 (8th Cir. 1973), *cert. denied,* 417 U.S. 949 (1974). Second, there were numerous telephone calls between Hammond and Boone prior to the sale on December 5, 1979. Third, at the time of that sale Boone stated that he could get just about any amount or quality of cocaine at any time, and one of the agents present testified that "Mr. Hammond agreed to contact Mr. Boone within a couple of days to arrange another trip to Miami to pick up a larger amount of cocaine." This evidence indicates that Boone, as a wholesale dealer, had a direct interest in seeing the drugs distributed by Hammond. *See United States* v. *Sin Nagh Fong,* 490 F.2d 527, 531 (9th Cir.), *cert. denied,* 417 U.S. 916 (1974). This conclusion is further supported by Boone's continued desire to sell drugs to Hammond in the following weeks. Although it is doubtful that any one of these factors alone would be sufficient to permit a jury to find Boone guilty of a conspiracy to distribute illegal drugs, we are satisfied that, when taken as a whole, the evidence supports the conviction.

Boone's second argument is that the district court erred in failing to dismiss Count II of the indictment, which concerned the December 5, 1979, sale in Miami, because venue was improper.

This contention is wholly without merit. At the beginning of the trial, counsel for Boone told the district court that he waived any venue objections he was entitled to make. The prosecutor indicated that this was done to accommodate the defense preference to have all counts tried at once. Pursuant to the request of the court, Boone later signed and filed a written waiver expressly consenting to the trial of Count II in the District of Minnesota rather than the Southern District of Florida. Moreover, Boone made no objections to venue until after he was convicted. There can be no doubt that Boone's venue objection was effectively waived and that the waiver precludes relief at this time. *See United States* v. *Haley,* 500 F.2d 302, 305 (8th Cir. 1974); *United States* v. *Powell,* 498 F.2d 890, 891-892 (9th Cir.), *cert. denied,* 419 U.S. 866 (1974).

The third argument raised by Boone is that he was denied a fair trial on all three counts because the district court failed to properly instruct the jury that evidence of out-of-court statements and certain other activity of Hammond could be considered only against Hammond, not against Boone.[2] He also maintains that the district court destroyed its appearance of impartiality by permitting the prosecutor to tell the jury that certain evidence was being admitted against Hammond alone.

We are not persuaded by these contentions. The transcript shows that limiting instructions were given to the jury when they were requested by Boone's counsel. On several occasions, the court gave the limiting instruction to the jury without being asked

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[2]We will assume, without deciding, that the evidence to which Boone objects was inadmissible as to him.

to do so. Indeed, at times the prosecutor asked that the jury be given an instruction that the evidence was not being offered against Boone and the court usually complied. In a few instances, the court allowed the prosecutor to assure the jury that the evidence was not being offered against Boone. While we do not regard that as the best practice, in the absence of objection at the time, Boone's contention that the prosecutor usurped the court's responsibility must fail. Furthermore, the district court carefully instructed the jurors in closing that out-of-court confessions or admissions by one defendant "may not be considered as evidence against another defendant not a party to that confession or admission."

Boone's final argument on appeal also challenges his conviction on all three counts. He maintains that the district court erred in refusing to sever his trial from that of his co-defendant, Hammond. He argues that the defenses of the two defendants were so antagonistic, and the actions of Hammond's counsel so prejudicial, that Boone was denied a fair trial.

At the trial, Hammond testified at length about his involvement in the alleged criminal activities; Boone presented no evidence in his own behalf. Hammond, who was a member of the Ramsey County Sheriff's Reserves, maintained that he was operating as a law enforcement officer during the period in question and therefore acted without criminal intent. In essence, Boone's argument is that Hammond's testimony, as well as evidence of Hammond's extrajudicial statements and actions, deprived him of a fair trial.

To hold that the district court abused its discretion in refusing to grant a severance, we must find that the joint trial prejudiced Boone's right to a fair trial. *United States* v. *Jackson,* 549 F.2d 517, 523-524 (8th Cir.), *cert. denied,* 430 U.S. 985 (1977); *see* Fed.R.Crim.P. 14. We are uanble to reach that conclusion. None of the objected to extrajudicial statements or activity of Hammond directly implicated Boone. In any event, as noted

earlier in this opinion, the jury was properly and adequately instructed that such evidence was to be considered only against Hammond. We think those instructions were sufficient to obviate any danger that unrelated bad acts of Hammond would be used to inculpate Boone.

Hammond's testimony is similarly insufficient grounds for finding that the district court abused its discretion in refusing to grant a severance. First, there is no reason to believe that Hammond would not have testified at Boone's trial if the defendants had been tried separately. By the time of trial, Hammond was cooperating with law enforcement officers and was taking the position that he had been acting as a government agent all along. Thus, any harm to Boone caused by Hammond's testimony cannot be blamed on the joint trial.

Moreover, it is clear that Hammond's defense was entirely consistent with Boone's. Hammond's theory, revealed at the opening of trial and consistently maintained throughout, was that Hammond was acting as a law enforcement agent when he arranged to buy cocaine from Boone. Boone's sole defense was that he was entrapped. Had the jury believed Hammond's testimony, Boone's defense would have been a strong one, since all his contacts would have been with law enforcement officials. Without Hammond's testimony, on the other hand, Boone's entrapment defense would have had little support. Entrapment requires inducement by a government agent, *United States* v. *Perl*, 584 F.2d 1316, 1320 (4th Cir. 1978), *cert denied*, 439 U.S. 1130 (1979); *United States* v. *Garcia*, 546 F.2d 613, 615 (5th Cir.), *cert. denied*, 430 U.S. 958 (1977); *Polski* v. *United States*, 33 F.2d 686, 687 (8th Cir.), *cert. denied*, 280 U.S. 591 (1929), and there is little evidence to suggest that anyone other than Hammond induced Boone to sell illegal drugs. Consequently,

Hammond's testimony that he was acting as a law enforcement official could only have furthered Boone's defense.[3]

For the foregoing reasons, the convictions of the appellant are affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[3]The joint trial and Hammond's testimony also provided Boone with another opportunity for exculpation. The jury was instructed that if one of the defendants was found not guilty of conspiracy—if Hammond was acting as a government agent, for example—the other must be found not guilty of conspiracy, as well.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1980

Re: No. 80-1405

United States of America,
Appellee,

v.

William Roger Boone,
Appellant.

Appeal from the United States
District Court for the
District of Minnesota.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

April 6, 1981